OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 18 May 2000 *

1. The essential question raised in this preliminary reference from the Bundesvergabeamt (Federal Procurement Office, hereinafter 'the BVA'), Austria is whether public service concession contracts are excluded from the scope of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [1] and Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. [2] If they are excluded, the further question of the determination of the scope of that exclusion arises. A number of other issues, such as whether those parts of a contract that fall within the scope of Directive 93/38/EEC may be severed from those which do not and the distinction between contracts for the supply of services and supply contracts, are also raised.

I — The legal and factual background

A — *Community law*

2. The eighth recital in the preamble to Directive 92/50/EEC states:

'Whereas the provision of services is covered by this Directive only in so far as it is based on contracts; whereas the provision of services on other bases, such as law or regulations, or employment contracts, is not covered ... .'

* Original language: English.

1 — OJ 1992 L 209, p. 1. Directive 92/50/EEC has since been amended by European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively, OJ 1997 L 328, p. 1.

2 — OJ 1993 L 199, p. 84. Directive 93/38/EEC has since been amended by Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1998 L 101, p. 1.

Article 1 of that Directive provides that:

'For the purposes of this Directive:

(a) *public service contracts* shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority, to the exclusion of:

...

(v) contracts for voice telephony, telex, radiotelephony, paging and satellite services ... .'

3. The 24th recital in the preamble to Directive 93/38/EEC states:

'Whereas the provision of services is covered by this Directive only in so far as it is based on contracts; whereas the provision of services on other bases, such as law, regulations or administrative provisions or employment contracts, is not covered.'

Article 1(4) of that Directive provides that:

'"supply, works and service contracts" shall mean contracts for pecuniary interest concluded in writing between one of the contracting entities referred to in Article 2, and a supplier, a contractor or a service provider, having as their object:

...

(c) in the case of service contracts, any object other than those referred to in (a) and (b) and to the exclusion of:

...

(iii) contracts for arbitration and conciliation services;

(iv) contracts for the issue, sale, purchase or transfer of securities or other financial instruments;

...

(vi) ... Contracts which include the provision of services and supplies shall be regarded as supply contracts if the total value of supplies is greater than the value of the services covered by the contract ... .'

Under Article 2(1), it is stated that the Directive 'shall apply to contracting entities which:

(a) are public authorities or public undertakings and exercise one of the activities referred to in paragraph 2 ... .'

Article 2(2) provides, in so far as is material, that '[r]elevant activities for the purposes of this Directive' include:

'...

(d) the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services ... .'

B — *Austrian law and the facts of the main proceedings*

4. The Post & Telekom Austria AG (hereinafter 'the PTA') is the successor in law, with effect from 1 January 1997, of the former Post & Telegraphenverwaltung (Post and Telegraph Administration). The Post & Telegraphenverwaltung was entrusted with operating the Austrian postal and telecommunications monopoly, which included the legal obligation to provide telephone directories.[3] It had, however, for economic reasons, decided in 1992 to seek a partner to assist it in the preparation of the Amtliches Telephonbuch (Official Telephone Directory, now known as the 'White Pages'). A contract (though

3 — Article 31 of the former Fernmeldegesetz (Telecommunications Law).

seemingly not in the form of a concession) was concluded in 1992, which expired at the end of 1997. In view of the pending expiry of that contract, the PTA proposed, by advertisement published on 15 May 1997 in the *Amtsblatt zur Wiener Zeitung* (bulletin annexed to the Austrian Official Journal), as well as in certain newspapers, to grant a concession to produce directories and electronic databases of its subscribers. The concessionaire would, in return for undertaking this obligation, be permitted profitably to exploit the concession, while the PTA would take a 40% stake in the company to be set up by the concessionaire for that purpose. The concession was shortly afterwards awarded to Herold Business Data AG ('HBD'), which would appear to be a corporate successor in law of the company which had been awarded the initial 1992 contract. [4] The concession was later concluded on 15 December 1997.

5. On 1 August 1997, the Telekommunikationsgesetz (Telecommunications Law, hereinafter the 'TKA') entered into force. [5] Article 19 of the TKA requires each provider of a public oral-telephone service to maintain, *inter alia*, an up-to-date telephone list of subscribers, information about its subscribers' numbers and a directory, available at least weekly, in a readable electronic form on request to the regulatory authority established under that Law. Users are to have access to this information, which must be available at a reasonable charge, as part of the universal telephone service in Austria under Article 24(1) and (2) of the TKA. The regulatory authority is required, under Article 26(1) of the TKA, to ensure that a global telephone directory, combining the information contained in the various individual directories, is made available. [6] Individual operators are, moreover, required, under Article 96(1), to produce a telephone book, which may, *inter alia*, be in printed and/or electronic form.

6. The applicants in the main proceedings, Telaustria and Telefonadress, took the view that the procurement procedures prescribed by the Community and Austrian legal provisions on public service contracts should have been applied to the contract in question. Following separate but subsequently joined applications made by the applicants for an arbitration procedure under Article 109 of the Bundesvergabegesetz (Federal Procurement Law, hereinafter the 'BVerG'), [7] an advisory opinion in their favour was issued by the Bundes-Vergabekontrollkommission (Federal Procurement Review Commission), which concluded, on 20 June 1997, that the BVerG rules were applicable.

7. The PTA chose not to comply with this recommendation but continued negoti-

4 — HBD is jointly owned by an undertaking GTE (74%) and by the PTA (26%).

5 — BGBl I No 100/1997.

6 — Up until 31 July 1997, the legal obligation to publish telephone directories was placed on the PTA pursuant to Article 2 of the Poststrukturgesetz, BGBl I No 201/1996.

7 — BGBl I No 56/1997.

ations in respect of the contract as advertised. In its view, the contract at issue was covered by the express exclusion of 'concessions of services' from the scope of the BVerG pursuant to Article 3(1)(8) of that Law. On 24 June 1997 Telaustria, later joined by Telefonadress, applied to the BVA for a re-examination procedure as well as for interim relief. Having initially granted an interim order in favour of the applicants, the BVA later, on 10 July 1997, decided provisionally to permit the proposed contract between the PTA and HBD to be concluded, on condition that it could be rescinded if the Community procurement rules were later found to be applicable to it.

8. The order for reference states that the TKA applies to the contract concluded between the PTA and HBD. On its establishment as a corporation, the PTA became a 100% publicly owned company. It is under the control of the Austrian authorities and, in the BVA's view, constitutes a public undertaking for the purposes of Article 2(1)(a) of Directive 93/38/EEC and, therefore, also a contracting entity for the purpose of that Directive.

9. The BVA describes the impugned contract as involving '... several — partly interlocking — contracts of differing content but between the same parties'. It states that the subject-matter of the printing contract 'is the production of printed telephone directories'.

The BVA points out that HBD must provide services involving, first: 'collection, processing and arrangement of subscriber data, and making the data technically accessible, in other words services within CPC No 841b, [8] "development of software packages", No 8431, "data processing and tabulation services", No 8432, "data gathering services", and No 8439, "other data processing services", possibly also No 844, "services of data banks"'. It describes these services as falling within 'category 7, "Computer and related services", of Annex XVI A of Directive 93/38/EEC'.

10. The second part of the contract concerns the production of printed telephone directories, which are described as being services in 'category 15, "Publishing and printing services on a fee or contract basis", for the purpose of Annex XVI A of Directive 93/38/EEC'. The final part of the contract described by the BVA comprises 'services within CPC No 871, "Advertising services", which are thus services within the meaning of category 13 of Annex XVI A of Directive 93/38/EEC'. In the BVA's opinion, the proportion of services listed in Annex XVI A of Directive 93/38/EEC outweighs those in Annex XVI B, so that that

8 — The 'CPC' is the United Nations Central Product Classification. As for the relevance of the 'CPC', see, in particular, paragraphs 10 and 32 et seq. of my Opinion and paragraphs 38 and 39 of the judgment in Case C-76/97 *Tögel* v *Niederösterreichische Gebietskrankenkasse* [1998] ECR I-5357.

Directive may be regarded as being applicable to the contract as a whole.

11. Taking the view that the exclusion of public service concessions from the scope of Directive 92/50/EEC does not necessarily support the PTA's assertion that such contracts are also excluded from the scope of Directive 93/38/EEC and having regard to the uncertain scope of what should be understood as such concessions, the BVA has referred the seven questions quoted below to the Court:

'Principal question:

Can it be inferred from the legislative history of Directive 92/50/EEC, in particular the proposal of the Commission (COM (90) 372 final, OJ 1991 C 23, p. 1), or from the definition of the term "public service contract" in Article 1(a) of Directive 92/50/EEC, that certain categories of contracts concluded by contracting authorities subject to that directive with undertakings which provide services are to be excluded a priori from the scope of the directive, solely on the basis of certain common characteristics as specified in that proposal of the Commission, without the need to rely on Article 1(a)(i) to (viii) or Articles 4 to 6 of Directive 92/50/EEC?;

If the principal question is answered in the affirmative:

Do such categories of contracts also exist, having regard in particular to the 24th recital in the preamble to Directive 93/38/EEC, within the scope of Directive 93/38/EEC?;

If the second question is answered in the affirmative:

May those categories of contracts excluded from the scope of Directive 93/38/EEC be adequately described, by analogy with Commission proposal COM (90) 372, as having as their essential feature that a contracting entity which falls within the scope *ratione personae* of Directive 93/38/EEC cedes a service for which it is responsible to an undertaking of its choice in return for the right to operate the service concerned for financial gain?;

Supplementary to the first three questions:

Is a contracting entity which falls within the scope *ratione personae* of Directive

93/38/EEC obliged, where a contract concluded by it contains elements of a service contract within the meaning of Article 1(4)(a) of Directive 93/38/EEC together with elements of a different contractual nature which are not within the scope of that directive, to sever the part of the overall contract which is subject to Directive 93/38/EEC, in so far as that is technically possible and economically reasonable, and make that part the subject of a procurement procedure under Article 1(7) of that directive, as the Court of Justice held in Case C-3/88 [9] before the entry into force of Directive 92/50/EEC with respect to a contract which was not subject as a whole to Directive 77/62/EEC?;

If that question is answered in the affirmative,

Is the contractual concession of the exclusive right to operate a service for financial gain, which will give the service provider an income which cannot be determined but which in the light of general experience will not be inconsiderable and may be expected to exceed the costs of providing the service, to be regarded as payment for the provision of the service, as the Court of Justice held in Case C-272/91 [10] in connection with a supply contract and a right ceded by the public authorities in lieu of payment?;

Supplementary to the above questions:

Are the provisions of Article 1(4)(a) and (c) of Directive 93/38/EEC to be interpreted as meaning that a contract which provides for the provision of services within the meaning of Annex XVI A, category 15, loses the nature of a service contract and becomes a supply contract if the result of the service is the production of a large number of identical tangible objects which have an economic value and thus constitute goods within the meaning of Articles 9 and 30 of the EC Treaty?;

If that question is answered in the affirmative:

Is the judgment of the Court of Justice in Case C-3/88 to be interpreted as meaning that such a supply contract is to be severed from the other components of the service contract and made the subject of a procurement procedure under Article 1(7) of Directive 93/38/EEC, in so far as this is technically possible and economically reasonable?'

9 — See *Commission* v *Italy* [1989] ECR 4035 (hereinafter '*Data-processing*').

10 — See *Commission* v *Italy* [1994] ECR I-1409 (hereinafter '*Lottomatica*').

II — Observations

12. Written observations have been submitted by Telaustria, the PTA, the Kingdom of Denmark, the Kingdom of the Netherlands, the French Republic, the Republic of Austria and the Commission. All of these, save Denmark and the Netherlands, also presented oral observations.

III — Analysis

13. In my view, the issues raised by the various questions referred by the national court may be summarised as follows:

(i) Is the contract in the present case, assuming that Community public-procurement rules apply, governed by Directive 93/38/EEC?;

(ii) Are public service concessions excluded from the scope of Directive 93/38/EEC?;

(iii) What is the scope of a public service concession contract in Community law and how are such concessions to be defined?;

(iv) If the relevant advertising rules of the Community procurement directives are not applicable, what, if any, publicity requirements would flow from the application of general Treaty principles?;

(v) In the event of Directive 93/38/EEC being inapplicable, does the fact that the concession is intended to lead to the production of a large number of (physical) telephone directories mean that it should be regarded, in whole or in part, as a supply contract and, thus, subject to the procurement rules of Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts? [11]

Although there are certain overlaps between these issues, I propose, for convenience, to deal with them in turn.

11 — OJ 1993 L 199, p. 1.

A — *Directive 92/50/EEC or Directive 93/38/EEC*

14. If Directive 93/38/EEC were applicable to a contract such as that between the PTA and HBD it would be unnecessary to provide any specific answer to the first question referred by the BVA. It is therefore appropriate, in my view, to consider first the possible applicability of the sectoral directive before examining other more general directives. However, even if Directive 93/38/EEC were alone applicable in the present case, it would not preclude consideration of other Community public procurement rules for the purposes of assisting in the interpretation of that Directive.

15. It is clear from the order for reference that the PTA, as a publicly owned telecommunications-services provider, falls, in principle, to be considered as a contracting entity for the purpose of Article 2(1) of Directive 93/38/EEC. Support for this view may also be derived from the 13th recital in the preamble to that Directive, which states that its scope 'should not extend to activities of those entities ... which fall outside the telecommunications sector'. Directive 93/38/EEC only applies, in accordance with its Article 2(1), where a contracting entity exercises 'one of the activities referred to in paragraph 2', which include 'the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services ...'. [12] While it may no longer be the only provider of such services active on the Austrian market, the BVA has itself described the PTA's 'tasks' as including 'the provision and operation of public telecommunications networks and the offering of public telecommunications services'. It is, as the Commission submits, clearly a sectoral contracting entity. It is common case that the production of both physical and electronic telephone directories is directly related to the provision of those services.

16. The BVA has itself provisionally taken the view that the services involved in the contract between the PTA and HBD, viewed as a whole, fall within the scope of Directive 93/38/EEC, and, more particularly, that it should be regarded as being a 'supply' contract for the purpose of Article 15 thereof. In order to determine whether the contract at issue comes within the material scope of Directive 93/38/EEC, there is nothing in the information available to the Court that would call into question the BVA's assessment that, but for the fact that it may be excluded by reason of constituting a concession, the contract should be considered to fall within the scope of that Directive. In my opinion, it is unnecessary, for the purpose of answering the questions referred, to take a view on whether it would constitute a 'supply' or 'service' contract. This is because, if a contract like that at issue in the main proceedings may be considered to be a supply or a service contract within the meaning of Article 1(4) of Directive 93/38/EEC, then the publicity rules prescribed by either Article 15 or 16 of that Directive would apply.

12 — See Article 2(2)(d), quoted fully in paragraph 3 above.

17. I do not agree with the PTA that the services which fall within the scope of Directive 93/38/EEC are only those which occur at the end of a long chain of services and which, in so far as the present case is concerned, relate directly to the actual provision of voice-telephony services. It emerges clearly from the 17th recital in the preamble to Directive 92/50/EEC that the provisions of that Directive were not intended to affect the predecessor to Directive 93/38/EEC; in other words, where a contract falls within the scope of the sectoral Directive, the more general provisions of Directive 92/50/EEC are inapplicable. While the services included within the scope of the latter are listed, *inter alia*, in Annex I A to the Directive and include 'telecommunications services' (category 5), it is clear from the footnote accompanying that category that voice-telephony services are excluded. Only a very narrow interpretation of the scope of Directive 93/38/EEC would justify the PTA's view that a contract concerning the production of telephone directories is insufficiently related to the provision of voice-telephony services for that Directive to be applicable. In my view, such a narrow construction is misconceived. It is particularly relevant, as noted in the order for reference, that category 15 of Annex XVI to Directive 93/38/EEC expressly includes 'publishing or printing services' as being among the services covered by the publicity procedures required under Article 15.

18. Moreover, Article 1(4) of Directive 93/38/EEC describes, *inter alia*, the service contracts covered by that Directive as being 'contracts for pecuniary interest concluded in writing between one of the contracting entities referred to in Article 2, and a supplier, a contractor or a service provider', and which have as their object (see Article 1(4)(ii)) 'voice telephony ... services'. Accordingly, I am satisfied that the BVA has correctly assumed that Directive 93/38/EEC is, in principle, the applicable directive in the present case. The issue raised by the second, third and fifth questions (as well as indirectly by the first question) should therefore be interpreted as being whether the concession nature of the contract between the PTA and HBD precludes the application of Directive 93/38/EEC. In reality, this is the core issue in this case.

B — *The exclusion of public service concessions*

19. The applicants submit that public service concessions should not be viewed as falling outside the Community procurement rules because such an interpretation would subject those rules to the variation in the activities that are considered to be public activities in the various national laws. The need to interpret exceptions from the scope of the public procurement rules narrowly precludes such an exception. Alternatively, if concessions are excluded, there must be a genuine transfer of an activity that is in the public interest for it to comprise a public service concession. This, they allege, is not the case as regards the

production of telephone directories. They point to the fact that there was no express Commission proposal to include public service concessions within the scope of Directive 93/38/EEC and conclude that it would be unjustified to deduce an exclusion of such contracts from the silence of the Directive on the matter.

20. The PTA, supported by the intervening Member States and the Commission, essentially submits that it is clear from the legislative history of Directive 92/50/EEC, as well as from consideration of the overall scope of the Community procurement directives, that the Council did not wish to include concessions within the scope of either that Directive or Directive 93/38/EEC. The material scope of the latter Directive is limited to the types of contract therein included, of which concessions are not an example.

21. In my view, it is perfectly clear that the Council rejected the Commission's proposal to include concessions within the scope of Directive 92/50/EEC. In its initial proposal, submitted on 13 December 1990, 'public service concessions' were distinguished from 'public service contracts' in Article 1(a)(vi), defined in Article 1(a)(h) and subjected to the publicity rules of the proposed directive by Article 2. [13] Apart from a more developed definition of a 'public service concession', essentially similar provisions were included in the amended proposal submitted on 28 August 1991. [14] The initial rationale given by the Commission for their inclusion appeared in the 10th recital of the proposal, where the Commission stated that 'in order to ensure coherent award procedures, public service concessions should be covered by this Directive in the same way as Directive 71/305/EEC applies to public works concessions'. The reference to the latter directive was dropped in the 10th recital of the amended proposal, which simply stated that the inclusion of public service concessions was necessary 'to ensure coherent award procedures'. During the legislative process, the Council decided to eliminate all references to public service concession from the proposal. Its reasoning appears in the document setting out the reasons for its common position and cited by France in its written observations. [15] The Council's decision can only, as France submits, be construed as an express refusal to include such concessions within the scope of Directive 92/50/EEC.

13 — Proposal for a Council Directive relating to the coordination of procedures on the award of public service contracts, COM(90) 372 final, OJ 1991 C 23, p. 1. Special rules dealing with the situation where a concessionaire is a contracting authority were set out in Article 3 of the proposal.

14 — Amended proposal for a Council Directive relating to the coordination of procedures on the award of public service contracts, COM(91) 322 final, OJ 1991 C 250, p. 4.

15 — Document No 4444-92-ADD-1 of 25 February 1992. Essentially, the Council felt that the differences between the various national laws on such concessions were too great so that the impact of adopting the proposal would not be the same in all Member States. In its written observations, Austria points out that that opposition was motivated by the fact that in some Member States concessions were only granted by public (administrative) acts which would therefore have fallen outside the Commission's proposed definition which was based on concessions being granted pursuant to consensual contracts governed by private law. This was recognised, if regretted, by the Commission itself in its communication to the European Parliament concerning the common position; see SEC(2) 406 final of 5 March 1992.

22. It is in this light that I interpret the failure of the Commission even to propose the inclusion of public service concessions in its proposal, submitted on 27 September 1991, for what became Council Directive 93/38/EEC to be significant. [16] More significant still, however, is the fact that in its amended proposal for what became the predecessor directive to Directive 93/38/EEC — namely, Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, [17] the first sectoral public procurement directive — the Commission had proposed certain provisions to regulate public service concessions. [18] This proposal was not accepted by the Council because such concessions occurred in only one Member State and the Council deemed it inappropriate to proceed with their regulation in the absence of a detailed study of the diverse forms of public service concessions accorded in the Member States in respect of the water, gas and electricity sectors. [19] This assessment of the legislative history clearly demonstrates that the silence of Directive 93/38/EEC in respect of concessions was intentional and clearly designed to exclude them. In the present case, it therefore provides a clear aid to construing the text of the Directive as finally adopted by the Council.

23. I would draw additional support for this view from the directives dealing with public works contracts. In the first public procurement directive, Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts, Article 3(1) expressly excluded concession contracts from the scope of the 'public works contracts' defined in Article 1(a) as 'contracts for pecuniary consideration concluded in writing between a contractor ... and an awarding authority' which were subject to it. [20] In 1989, Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning the coordination of procedures for the award of public works contracts adopted a definition of 'public works concession' (see the new Article 1(d) inserted by Article 1(1) of Directive 89/440/EEC) and included 'advertising rules' to be applied to the award of such concessions (see the new Article 1*b* inserted by Article 1(2) of Directive 89/440/EEC). [21] This is highly significant because, for the first time, the Community public procurement rules expressly addressed the phenomenon of concessions. At the time of the award of the contract at issue in the main proceedings, the relevant provisions were those contained in the consolidated directive which replaced Directive 71/305/EEC, namely Council Directive 93/37/EEC of 14 June 1993 con-

16 — Proposal for a Council Directive amending Directive 90/531/EEC on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, COM(91) 347 final, OJ 1991 C 337, p. 1.

17 — OJ 1990 L 297, p. 1.

18 — Amended proposal for a Council Directive on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors; see COM(89) 380 final, OJ 1989 C 264, p. 22.

19 — See point 10 of Council Document No 5250/90 of 22 March 1990, MAP 7, PRO-COOP 28, a copy of which was annexed by the Commission to its written observations.

20 — OJ, English Special Edition, First Series 1971 (II), p. 682.

21 — OJ 1989 L 210, p. 1.

cerning the coordination of procedures for the award of public works contracts.[22] This Directive was adopted on the same day as Directive 93/38/EEC. It is, therefore, to my mind obvious that if the Council had wished to include public service concession within the scope of Directive 93/38/EEC it would have done so expressly, as it did when adopting Directive 93/37/EEC. The only reasonable inference to be drawn from its omission to do so is that which has already been drawn by Advocate General La Pergola in his Opinion in *Arnhem and Rheden*, namely that Directive 93/38/EEC 'covers only service *contracts*'.[23]

24. It is, consequently, clear that the Community public procurement law notion of '*contracts for pecuniary interest concluded in writing*' (my emphasis), which appears in all directives from Directive 71/305/EEC, the first directive, up to and including Directive 93/38/EEC, has never encompassed concessions. It is not possible to argue, as the applicants implicitly do, that a literal interpretation of that notion, as it now appears in Article 1(4) of Directive 93/38/EEC, would permit written concession-type agreements, where the consideration is obtainable whether wholly by exploitation or partly by both exploitation and payment from the awarding entity, to fall within its scope. In other words, even if the legislative history were to be overlooked, a contextual construction of the notion of pecuniary interest, which would be necessary given that it is not defined in Directive 93/38/EEC, would exclude concessions.

25. It follows, in my opinion, that the Court should rule that 'public service concessions' do not fall within the scope of Directive 93/38/EEC.

C — *The scope of the notion of public service concessions*

26. Since I take the view that public service concessions are excluded from the scope of Directive 93/38/EEC, it is necessary, in order to answer the third and fifth questions referred by the national court, to consider the type of 'arrangement' that may be viewed as such a concession and, thus, excluded from the publicity rules of that Directive. In doing so, I am conscious that the Community legislature, except where concessions have explicitly been included, has not found it necessary to define the notion of 'public service concessions'. In those circumstances, I agree both with the Member States who have intervened in this case and with the Commission that, in the absence of a legislative definition, criteria for identifying what constitutes a concession need to be identified by the Court so as to assist the BVA to make its final decision in the present case.

22 — OJ 1993 L 199, p. 54. Council Directive 89/440/EEC and Council Directive 93/37/EEC will, for convenience, occasionally hereinafter be referred to as 'the public works directives'.

23 — Case C-360/96 [1998] ECR I-6821, paragraph 26 (emphasis in original).

27. The applicants submit that the essence of a concession resides in the fact that no remuneration is paid by the granting entity to the concessionaire. The latter must therefore simply be given the right economically to exploit the concession, although this right may, in their view, be accompanied by a requirement to pay consideration to the grantor. They also contend that the subject-matter of the concession must concern a public interest service related to the exercise of public power. This is not the case here, in their view, since each telecommunications-service provider is obliged by Article 96(1) of the TKA to publish a directory.

28. The observations of the other parties and interveners who have submitted observations are largely *ad idem* as regards the main distinctive features of a concession. They would classify a concession by reference to three essential characteristics. First, the beneficiary of the service provided must be third parties rather than the awarding entity itself. Second, the subject of the service ceded must concern a matter which is in the public interest. Finally, the concessionaire must assume the economic risk related to the performance of the service at issue.

29. In the first place, it is important to bear in mind that 'public service concessions' are not covered by Directive 93/38/EEC. I do not therefore accept, as the applicants have submitted, that it is necessary to interpret their scope narrowly. They do not constitute derogations from the publicity rules of the Directive but rather a type of 'arrangement' that is not covered by the Directive and thus beyond the remit of those rules.

30. It seems to me that an appropriate starting point would be the definition contained in the public works directives, since this is the only definition which has been approved to date by the Community legislature. Article 1(d) of Directive 89/440/EEC initially defined a 'public works concession' as 'a contract of the same type as ["public works contracts"] except for the fact that consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment'.[24] The justification for including such concessions within the scope of the Directive was set out in the 11th recital in its preamble and was cited as being 'the increasing importance of concession contracts in the public works area and of their specific nature ...'.[25] An identical definition of a 'public works concession' along with an identical justification for the inclusion of such concessions was later retained in Directive 93/37/EEC.[26] In my view, the Community legislature has viewed the absence of, at least full, consideration passing from the granting entity to the concessionaire as constituting the

24 — It thus largely replicated the earlier definition of what was excluded from the notion of 'contracts for pecuniary interest concluded in writing' by Article 3(1) of Directive 71/305/EEC.

25 — The advertising rules applicable to such 'contracts' were prescribed by the new Article 1*b* inserted into the Directive 71/305/EEC by Article 1(2) of Directive 89/440/EEC.

26 — See Article 1(d) and the fifth recital in the preamble to the Directive.

essence of a concession. I agree that this represents a fundamental feature of a concession whose importance is not limited to those which are concerned with public works. This feature, to my mind, finds expression in the fact that the concessionaire itself must bear the principal, or at least the substantive, economic risk attaching to the performance of the service involved. If the national court is satisfied that the economic burden or risk has effectively been passed to the concessionaire by the grantor of the concession, then there must be a very strong presumption that the 'arrangement' concluded between them amounts to a concession rather than a contract.

31. To my mind, the single most important indication of whether economic risk is to be borne by the concessionaire will emerge from examining the nature of the exploitation in which the supposed concession requires it to engage. *Arnhem and Rheden* provides a strong indication that the Court views the requirement to exploit the right ceded in order to obtain remuneration as the core of what constitutes a genuine concession. In response to an argument raised by France in its observations that the contracts at issue in that case (which concerned a joint venture between two Dutch municipalities to provide municipal refuse-collection and road-cleaning services through ARA, a company set up expressly for that purpose) could be regarded as a public service concession, the Court declared, without finding it necessary to interpret that term, that it was clear from the underlying agreement 'that the remuneration paid to ARA comprises *only a price and not the right to operate a service*'.[27]

32. Reference was made at the hearing to a draft communication from the Commission on the interpretation in Community law of public procurement concessions.[28] In that communication, to which various references were made at the hearing, the Commission sets out a number of illustrations of circumstances which had come to its attention but which, in its view, did not satisfy the requirement that the risk be borne by the concessionaire.[29] Thus, where, for example, the public authorities effectively guarantee to indemnify the concessionaire against future losses, or where there is no effective exploitation by the concessionaire of the service whose performance is ceded, the Commission submits that the 'arrangement' at issue could not amount to a concession.

33. I would, however, agree with the observations of France to the effect that

27 — Paragraph 25 (emphasis added). The Court, thus, implicitly agreed with Advocate General La Pergola's view that an 'important feature of service concessions in the Community context [is] that the concessionaire automatically assumes the economic risk associated with *the provision and management of the services that are the subject of the concession*'; paragraph 26 of his Opinion (emphasis added).

28 — At the date of the hearing (23 March 2000) a draft proposal only had been published on the Internet; see the 'Projet de communication interprétative de la Commission sur les concessions en droit communautaire des marchés publics', DG XV XV/B — 24 February 1999 (http://europa.eu.int/comm/internal_market/en/pub/publproc/general/concfr.pdf.), which was seemingly available only in French. However, it has since (29 April 2000) been published as an interpretative communication in the Official Journal; see OJ 2000 C 121, p. 2.

29 — See footnote 10, in particular, of the communication.

there is no overriding definition of a 'public services concession'. All that is clear, as *Lottomatica* and *Arnhem and Rheden* reveal, is that where the remuneration is fixed or determinable the arrangement should be viewed as contractual and falling, prima facie, within the scope of the relevant procurement directive. In *Lottomatica*, the Italian State had published a contract notice for the purported 'concession' of the computerisation of the Italian Lotto. Italy alleged that as a concession to carry out a public service it was not covered by Directive 77/62/EEC. [30] The Court rejected this plea. It held that the 'introduction of the computerised system in question does not involve any transfer of responsibilities to the concessionaire in respect of the various operations inherent in the lottery' and that it was 'common ground that the contract at issue relate[d] to the supply of an integrated computerised system including in particular the supply of certain goods to the administration'. [31] The fact that the system was only to become the property of the administration at the end of the contractual relationship with the tenderer was 'irrelevant', because the '"price" for the supply [took] the form of an annual payment in proportion to revenue'. [32] It is, therefore, necessary in each case to look at a number of factors which will indicate whether in reality the arrangement between the parties amounts to a written contract for a pecuniary interest in respect of the provision of services. There is a general consensus in the observations as to the relevance of the other criteria cited by Advocate General La Pergola in his Opinion in *Arnhem and Rheden*, to wit that 'in the case of a concession, the beneficiary of the service is a third party unconnected with the contractual relationship'. [33] Although I would not reject entirely the potential assistance which may be derived from this factor in certain borderline cases, it would seem to me to add little to the requirement that the concessionaire effectively obtain at least a significant proportion of its remuneration not from the granting entity but from the exploitation of the service. If, in reality, its only customer were from the outset to be the awarding entity, as opposed to third parties, it is difficult to see how the 'arrangement' between them could escape classification as a 'contract for pecuniary interest'. Indeed, such a situation would approximate to the facts of *Lottomatica*, where the only customer of the purported concessionaire was clearly the public administration responsible for conducting lotteries in Italy.

34. There is less consensus in the observations submitted regarding the relevance of the public interest nature of the service ceded. In his Opinion in *Arnhem and Rheden*, Advocate General La Pergola expressed the view that '[u]nder Community law, the service that is the subject of a service concession must also be in the general interest, so that a public authority is institutionally responsible for providing it'. [34] He went on to say that '[t]he fact that a third party provides the service means that the concessionaire replaces the authority granting the concession in respect of its obligations to ensure that the service is

30 — Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, OJ 1977 L 13, p. 1.

31 — Paragraph 24.

32 — Paragraph 25.

33 — Paragraph 26.

34 — Paragraph 26.

provided for the community'.[35] Contrary to the applicants' submission, I would not read the judgment in *Data-processing* as supporting this view. The reference to 'public service' in that case was related to the Court's rejection of Italy's plea in that case that the development of the data-processing systems for the performance of certain public activities was in itself a public service activity which was excluded from the scope of Directive 77/62/EEC.[36] The Court held that neither the supply of the equipment required nor the design of the system itself, although 'enabl[ing] the authorities to carry out their duties [,] ... in themselves constitute[d] a public service'.[37]

35. It would appear that the supposed relevance of the general interest nature of the service that is the subject of the concession derives from the definition proposed by the Commission in both its initial and amended proposals for a procurement directive concerning public service contracts, where it referred, at Article 1(h) in both cases, to the transfer by an awarding authority of 'the execution of a service to the public lying within its responsibility'.[38] I doubt whether the notion of 'a service to the public' should, save in the broadest sense of the word, be construed as requiring that it be one that is in the 'general' interest. On the contrary, it seems to me that it should merely refer to the fact that the typical intended beneficiaries of a genuine 'public service concession' will be third-party members of the general public or a particular category of that general public. I certainly do not consider that it is necessary for the service at issue to be capable of being regarded as a service of general economic interest in the sense in which that notion has been interpreted for the purposes of applying Article 90 of the EC Treaty (now Article 86 EC).[39] In other words, there should, in my opinion, be no qualitative bar to the sorts of service that a contracting entity may legitimately seek to award by way of concession, although it is likely that there will be a public interest in most of the services that are awarded in that manner.

36. In any event, I do not see how the Court could devise criteria for determining what may or may not properly be viewed as being in the public interest. To my mind, the adoption of the view that only public interest services are proper matters for 'public service concessions' and of the concomitant required definition of such interests are plainly matters for the Community legislature if it opts to harmonise, in the interests of the internal market, the rules regarding such concessions. This is

35 — Ibid.

36 — Loc. cit., footnote 30 above.

37 — *Data-processing*, paragraph 26.

38 — See OJ 1991 C 23, p. 1 and OJ 1991 C 250, p. 4, cited initially in footnotes 13 and 14 above.

39 — See, for example, the recent judgment in Case C-67/96 *Albany International* v *Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, paragraphs 102 to 107.

borne out by the fact that, at the hearing, the Commission accepted that there was no clear definition of public interest in Austrian law and that it must be left to the national courts to determine its scope. Acceptance of such a principle would, of course, be a recipe for the non-uniform application of Directive 92/50/EEC, with certain national courts taking the view that the Directive applied to concessions because the subject-matter of the service ceded was not capable of being regarded as falling within the public interest of the relevant Member State. It should be avoided. In any event, it is unnecessary to adopt any final view on this matter in the present case because I agree with the submission made by the PTA at the hearing that, once the performance of an obligation has been imposed by public law — as that at issue in the present case has by virtue of Articles 26(1) and 96(1) of the TKA —, its performance may be deemed to be in the public interest of the Member State concerned. It should also be irrelevant whether the awarding entity is the only entity or merely one of a number of entities which is subject to the obligation in question and whether overall responsibility for ensuring the performance of the obligation is imposed upon a regulatory authority.

37. In summary, therefore, a case-by-case approach should be adopted to the question of whether a contract amounts to a concession or a service contract which takes account of all indicative factors, the most important of which is whether the supposed concession amounts to a conferral of a right to exploit a particular service as well as the simultaneous transfer of a significant proportion of the risk associated with that transfer to the concessionaire.

38. In their observations the applicants have advanced various arguments which seek to demonstrate that, in reality, the PTA is providing consideration to HBD. In the context of a preliminary reference, it is not for this Court to make any findings in this respect which remain exclusively a matter for the court or tribunal which has referred the case. However, as it emerges clearly particularly from the BVA's fifth question that it entertains doubts as to the degree of economic risk that must be borne by a concessionaire, it may be of assistance to it to consider briefly some of the allegations made by the applicants. They assert that the grant to HBD of the right to use the PTA logo is of considerable economic value. This coupled with the facts that all of the cost factors involved for HBD are relatively easy to determine in advance and that the possibility of selling advertising space in the directories amounts, as was asserted at the hearing, to 'a real gold-mine' gives the lie, in the applicants' view, to the claim that HBD undertook any real economic risk.

39. Naturally, this assessment is hotly contested by the PTA. It points out that

paragraph 16 of the contract expressly confers the responsibility of producing the directory on HBD. It submits that it has licensed HBD, in return for payment, to use its data for the purpose of producing that directory. However, this licence is not different from that which it would be willing to grant to any other economic operator who wished to exploit that information. As regards the logo, it has not authorised HBD to use its trade mark but has in fact obliged it to do so. This is an arrangement which is for its benefit because it profits from certain free and advantageously placed advertising in the directory. Moreover, the fact that the PTA has paid for the acquisition of a shareholding in HBD, which transaction is wholly independent of the concession, cannot be regarded as consideration paid to the latter in respect of that concession.

40. In my view, the mere fact that there is a likelihood that the concessionaire will be able beneficially to exploit the concession would not suffice to permit a national court or tribunal to conclude that there is no economic risk. To my mind, a national court or tribunal would need to be satisfied to a high degree of probability that the possibility of loss was minimal or even non-existent. Although it is for the BVA in the present case to make that determination, I am unconvinced that assertions such as those made by the applicants satisfy the test of no real or effective risk. HBD has to pay for the use of the data, which data could be obtained on the same terms by other economic operators. The requirement imposed on HBD to use the PTA's logo is clearly of economic benefit to the PTA. The mere fact that it might also benefit HBD does not render the concession into a contract since the extent of that benefit is not quantifiable in advance.

D — *General Treaty requirements*

41. It is common case in the observations submitted to the Court that, even if the grant of 'public service concessions' falls outside the scope of Directives 92/50/EEC and 93/38/EEC, the awarding authorities are, none the less, bound to respect the Treaty. It is also accepted that Articles 52 and 59 of the EC Treaty (now, after amendment, Articles 43 EC and 49 EC) would, in particular, preclude all direct and indirect discrimination based on nationality. In other words, awarding authorities must respect the principle of equal treatment between tenderers. They must also ensure that no conditions are imposed on the tenderer that would, in themselves, amount to an infringement of, for example, Article 30 of the EC Treaty (now, after amendment, Article 28 EC). It is not submitted in this case that any of those Treaty provisions have, at least directly, been infringed.

42. The Commission, however, asserts that entities awarding 'public service conces-

sions' are also under a more general obligation, which it appears to derive from the objectives underlying Articles 30, 52 and 59 of the EC Treaty, to ensure the transparency of the award procedures. At the hearing the Commission referred to *Unitrans Scandinavia and Others* v *Ministeriet for Fødevarer, Landbrug og Fiskeri* in support of this view. [40] That case concerned the obligations affecting a body other than a contracting authority, but upon which special or exclusive rights to engage in a public service activity have been granted by such an authority, when that body awards public supply contracts to third parties. The Court held that 'the principle of non-discrimination on grounds of nationality cannot be interpreted restrictively [and that] it implies, in particular, an obligation of transparency in order to enable the contracting authority to satisfy itself that it has been complied with'. [41] In answer to questions at the hearing regarding the scope of this obligation, the Commission was unwilling to suggest that it would extend to requiring publication of proposed 'public service concessions'.

43. I consider that substantive compliance with the principle of non-discrimination on grounds of nationality requires that the award of concessions respect a minimum degree of publicity and transparency. I agree with the Commission that what must at all costs be avoided is that their grant be shrouded in secrecy or opacity. I also accept the point made by the agent for Austria that publicity should not necessarily be equated with publication. Thus, if the awarding entity addresses itself directly to a number of potential tenderers, and assuming the latter are not all or nearly all undertakings having the same nationality as that entity, the requirement of transparency would, in my view, be respected. Transparency, in this context, is therefore concerned with ensuring the fundamental fairness and openness of the award procedures, particularly as regards potential tenderers who are not established in the Member State of the awarding authority. It does not, however, in my opinion require the awarding entity to apply by analogy the provisions of the most relevant of the Community procurement directives.

44. In any event, in the present case, there can be little doubt that a sufficient degree of transparency was respected. The offer was published in the Austrian Official Journal, in some of the Austrian newspapers and in certain leading international newspapers. Moreover, it is not suggested that the information published in the latter differed from that published in the former. I would conclude that this degree of publicity prima facie satisfied the requirement of transparency. The applicants, however, submit that, in the absence of publication of the results of the pilot programme run under the earlier contract with HBD's predecessor between 1992 and 1997, it was impossible for any tenderer other than HBD effectively to tender for the proposed concession. The accuracy of this assertion

40 — Case C-275/98 [1999] ECR I-8291.

41 — Paragraph 31.

cannot be verified by this Court. In my opinion, unless the BVA is satisfied that such publication, or the making available of the information concerned to serious potential interested tenderers, was crucial for ensuring the effectiveness of their tenders, it must conclude that the procedure adopted and followed by the PTA was not incompatible with Community law.

E — *Severance of the contract*

45. The question of the distinction between service and supply contracts, which is raised by the BVA's fourth, sixth and seventh questions, would arise only in the event that the Court were to find that, notwithstanding the concession aspects of a contract such as that at issue in the main proceedings, Directive 93/38/EEC was in principle applicable. Since I take the view that a concession like that at issue in the main proceedings should be considered to fall outside the scope of that Directive, provided the substantive burden of the economic risk involved in the exploitation of the service in question is transferred to the concessionaire, I address this issue very much in the alternative.

46. In reality, the BVA wishes to know whether a contract which could be classified as containing a supply element, to wit the production of telephone directories for or on behalf of the PTA, would fall to be considered within the scope of the temporally material supplies directive, namely Directive 93/36/EEC. [42] It seems to me that the answer to this question is provided clearly by Article 1(4) of Directive 93/38/EEC (quoted in paragraph 3 above). Thus, contracts which include both 'the provision of services and supplies shall be regarded as supply contracts if the total value of supplies is greater than the value of the services covered by the contract'. The Court too has recognised, especially in *Gestión Hotelera Internacional*, the importance of determining the predominant element of a contract where its component elements may fall within the scope of two discrete Community procurement directives. [43] However, '[i]t is for the national court to determine whether the works are incidental to the main object of the award'. [44] It is therefore for the national court, in applying Article 1(4) of Directive 93/38/EEC, to determine whether, in fact, the value of what may be regarded as supplies exceeds that which may only be classified as services. If this were the case, and assuming the contract at issue is not found to constitute a 'public service concession', the procurement rules of Directive 93/36/EEC would alone be applicable to it.

42 — Loc. cit., footnote 11 above.

43 — Case C-331/92 [1994] ECR I-1329; see in particular paragraphs 25 to 27.

44 — Ibid., paragraph 28.

IV — Conclusion

47. In the light of the foregoing, I propose that the questions referred by the Bundesvergabeamt be answered as follows:

(1) The provision or operation of public telecommunications networks or the provision of one or more public telecommunications services for the purposes of Article 2(2)(d) of Council Directive 93/38/EEC includes contracts concerned with the production of telephone directories;

(2) 'Public service concessions' do not fall within the scope of Directive 93/38/EEC;

(3) In the absence of a definition adopted by the Community legislature of the notion of 'public service concessions', it is necessary in each case for the national court or tribunal to look at all the factors which are capable of indicating whether, in reality, the arrangement between the parties amounts to a written contract for a pecuniary interest in respect of the provision of services. The predominant and characteristic feature of such a concession is the grant of a right to exploit a particular service together with the associated economic risk;

(4) Substantive compliance with the Treaty-based principle of non-discrimination on grounds of nationality requires that the award of 'public service concessions' respect a minimum degree of publicity and transparency, the purpose of which should be to ensure fundamental fairness in the awarding procedures and a reasonable opportunity for tenderers who are not established in the Member State of the awarding entity to submit tenders;

(5) Contracts falling within the scope of Directive 93/38/EEC which include components concerned with the provision of services and supplies shall by virtue of Article 1(4) of that Directive be regarded as supply contracts, for the purpose of the Community-procurement rules, if the total value of supplies is greater than the value of the services covered by the contract.